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OGC HAS REVIEWED.

19 July 1951

MEMORANDUM FOR: Deputy Director (Administration)

SUBJECT: Retired Officers as Intermittent Consultants

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I. PROBLEM

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CIA wishes to obtain the services of [] for consultation and advice on national estimates. The sole purpose is to obtain the benefit of their experience and wisdom in consideration of problems relating to the national security by the Senior Panel of the Office of National Estimates. They will perform no staff or administrative functions and will be requested to serve only at the call of ONE for estimates requiring their consideration. They will thus serve on a purely consultant basis intermittently as required by ONE. For each day on which service of this nature is performed, ONE proposes to compensate [] in the amount of \$50.00. It is estimated that their services will be required on an average of 10 to 12 days a month. The question presented is whether there is any law or regulation which prohibits service of this nature or, if not prohibited, whether such service would in any way impair their retired status or require withholding of retired pay for days on which compensation is received as consultants to CIA.

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II. DISCUSSION

On questions involving compensation or pay, final authority within the Government is the Comptroller General, subject only to appeal to the Court of Claims in specific cases. Of the voluminous rulings of the Comptroller General on retired officers, only two have been found which touch directly on the above question.

The first concerned the use of officers retired for disability as consultants in the Department of Medicine and Surgery of the Veterans' Administration. The question was whether such service would constitute holding a civilian office or position within the meaning of section 212 of the Economy Act of 1932 which requires an election between civilian

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salaries attached to such offices and retired pay. In 26 Comptroller General 501, the Comptroller held that since the consultants would not perform or supervise the duties and responsibilities imposed by law on the agency, or be under administrative control in the usual sense, they would serve in an advisory capacity only on a fee basis, and therefor would not be regarded as holding an "office or position" within the meaning of those terms as used in the Economy Act.

The second involved employment of Rear Admiral G. L. Schuyler, U. S. Navy, Retired, as a consultant on an intermittent basis by the Atomic Energy Commission. The Comptroller General ruled that since Admiral Schuyler was employed at the rate of \$40.00 per day when actually working, with proportionate deductions from such compensation when not required to work full days, he was paid on a time basis as distinguished from a fee basis and, therefore, was subject to the restrictions of section 212 of the Economy Act. However, such restrictions were applicable only on such days as he was in receipt of compensation for his civilian position, and on those days on which he received no compensation from his civilian position, he was entitled to receive his full retired pay.

In his discussion of the case, the Comptroller General discussed the difference between payment when actually working, on a time basis, and payment on a fee basis for each consultation or for each day on which work was performed without regard to the time consumed. In 28 Comptroller General, page 382, he states:

"Also, it has been held that such a retired officer, if employed solely in an advisory capacity -- such as for consultation purposes only -- and paid upon a fee basis for each such consultation, is not holding a 'civilian office or position' within the meaning of that phrase as used in the said section 212, and that by reason thereof such officer is not subject to the restrictions contained therein."

The Comptroller went on to point out that merely designating retired officers as consultants would not except them from section 212 of the Economy Act, but that his holding was based on the proposition that where the nature of the duties required is purely advisory, generally performed at infrequent intervals, and the compensation payable therefor is upon a fee basis, as distinguished from a purely time basis, the status of the employee is not such as would constitute the holding of an office or position within contemplation of section 212. He stated:

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"No particular one of the enumerated elements is considered as determinative of the matter. On the contrary, the absence of any one of such elements is sufficient to take a particular case out of the rule enunciated in that decision."

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Based on the language of that ruling, I discussed the proposal to contract with [] as an intermittent consultant on a fee basis to advise on military aspects of national estimates with the General Counsel to the Comptroller General on 6 January 1951. Mr. Fisher said the proposed arrangement was clearly permissible without deduction of the retired pay if it was for occasional conference and collaboration. I thereupon pointed out that the services of General Huebner in this capacity would probably continue for a considerable period in the future and asked if such continuity of tenure might be subject to question. Mr. Fisher asked about the frequency and regularity of consultation. I had discussed this with []

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[] and their best estimate was that [] would be called on for approximately 10 days consultation per month at one, two or three-day periods at a time. Mr. Fisher stated that in his opinion 10 days scattered throughout the month would be permissible whereas 29 would indicate permanent tenure. No indication was given of where the dividing line lay.

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The crucial question in this discussion arises in the meaning of the words which say that the duty required is "generally performed at infrequent intervals." No guide is given in the Schuyler opinion as to whether this means once every three months or once every three days. I have an informal opinion from Mr. Fisher that 10 to 12 days a month may be considered as performance at infrequent intervals.

This opinion is not binding on the Comptroller General as to any rulings he might make in the future, but I believe it will serve to prevent any possibility of collection back for periods of past service. The Comptroller General will not give advance opinions on hypothetical cases or proposals for the future. He will look only at facts actually before him. In such consideration, however, I believe he would be strongly influenced by his prior ruling in the Schuyler case and the unofficial opinion of his General Counsel.

III. CONCLUSIONS

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1. There is no legal objection to the performance of [] for services as desired by CIA.

2. Performance of those services will in no way impair their retirement status.

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3. Retired pay need not be withheld for days on which compensation is received from CIA, subject to possible modification by the Comptroller General of his current rulings in regard to a set of facts on which he has not previously ruled.

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LAWRENCE R. HOUSTON
General Counsel

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